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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL CAMPBELL, Defendant and Appellant.	B288428 (Los Angeles County Super. Ct. No. BA442781)

APPEAL from a judgment of the Superior Court of Los Angeles County, Curtis B. Rappe, Judge. Affirmed.

Gail Harper, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr. and Charles J. Sarosy, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted appellant Michael Campbell of second degree murder of his friend Brian Denton, who was found dead in appellant's apartment, having suffered blunt head trauma resulting in a skull fracture and 22 lacerations. Appellant was the sole eyewitness to the killing, though two neighbors heard sounds of a struggle and cries for help coming from appellant's room. The morning after the killing, appellant left the apartment and neither reported the death nor returned home. When arrested five days later, appellant was carrying bags and a backpack. At trial, appellant testified he killed Denton in self-defense, after Denton repeatedly attacked him. Appellant's counsel argued theories of reasonable and "imperfect" self-defense, which the prosecutor rebutted.

On appeal, appellant contends: (1) the trial court committed instructional error in (a) failing to instruct the jury on the heat of passion theory of voluntary manslaughter, and (b) giving the standard flight instruction; and (2) his trial counsel was ineffective for (a) failing to request a jury instruction on the factors affecting "earwitness" identification, and (b) failing to challenge the prosecutor's conduct in reserving the primary substance of her closing argument for rebuttal. Finding no error, we affirm.

STATEMENT OF THE CASE

The state charged appellant with Denton's murder. (Pen. Code, § 187, subd. (a).) In an amended information,

the state additionally alleged appellant personally used a clothing iron as a deadly and dangerous weapon. (*Id.* § 12022, subd. (b)(1).) A jury convicted appellant of second degree murder and found the deadly weapon allegation true. Appellant timely appealed.

STATEMENT OF THE FACTS

A. *The Prosecution Case*

1. *Discovery of Denton's Extensively Damaged Body in Appellant's Room*

In December 2015, appellant was living in a single resident occupancy apartment in the Florence Hotel in Los Angeles. The building manager, Krystal Jones, testified that surveillance video from the evening of December 31 showed appellant and Denton entering appellant's room together at 9:42 p.m. It showed Denton leaving and re-entering the room, entering for the last time at 10:30 p.m. Surveillance footage from the next morning, January 1, 2016, showed appellant emerging from the room and immediately leaving the building. Video surveillance showed no one entering or leaving the room thereafter until the morning of January 5, when a security officer, at Jones's request, entered the room and discovered Denton's body.

Los Angeles Police Department (LAPD) officer Efrain Ochoa testified that he and his partner entered appellant's room in response to the suspicious death call. He observed Denton's bloodied, damaged, and distorted face. He further observed debris throughout the room.

LAPD detective Jason Sharman testified that he investigated the room the same day, accompanied by a police officer and a criminalist photographer. Detective Sharman found blood on the door, the carpet, a dresser, and elsewhere, including on a tank top "soaked" in blood. He observed "substantial" injuries to Denton's face and head, including to the back of his head and to the back of one ear. Staples were embedded in Denton's skin. Detective Sharman found a stapler and a clothing iron in the room. Reddish stains on the stapler and clothing iron contained Denton's DNA, according to stipulated testimony from a senior LAPD criminalist.

Matthew Miller, M.D., a deputy medical examiner for the Los Angeles County Department of Medical Examiner-Coroner, testified that he performed an autopsy of Denton's body several days after its discovery. Dr. Miller determined Denton's death was a homicide caused by blunt head trauma. Denton's head had suffered a skull fracture and 22 separate lacerations. Dr. Miller opined fifteen to seventeen of the blows that caused these lacerations were potentially disabling or fatal. He testified that the iron found in appellant's room could have caused Denton's head injuries. Additionally, he observed staples in Denton's skin and scrapes and bruises scattered on it, including a possible bite mark.

2. *"Earwitness" Testimony Concerning a Struggle in Appellant's Room*

Wendell Blassingame lived in the room across from appellant's. He testified that on the night of the homicide, around 11:35 or 11:40 p.m., he was awakened by sounds of fighting from appellant's room. He could still hear rumbling 20 to 25 minutes later, when a neighbor, Rose Gibson, came to his room and asked him to call the police. He called building security instead. After calling security, Blassingame heard a loud noise and someone screaming for help. Although he had spoken with appellant before, he could not tell whether the person calling for help was appellant. He was not sure whether the person was male or female. Blassingame called security again. The noise from appellant's room stopped. Five to 15 minutes after his second call, he saw two security officers arrive, knock on appellant's door, announce themselves as security, and walk away after no one responded.

Rose Gibson lived in a room adjoining appellant's. She testified that around 11:30 on the night of the homicide, she heard sounds of fighting from appellant's room. The noise continued for about 20 minutes. She knocked on the wall she shared with appellant and asked if he was all right. Gibson heard a voice that sounded like appellant's say, "Call the police." Appellant's room was then silent. Gibson went to Blassingame's room and told him to call building security and the police.

Gibson denied having spoken with LAPD detective Douglas Pierce after the homicide, and denied telling him she had heard a woman's voice coming from appellant's room. She testified that appellant's voice was the only one she heard. Following this testimony, Detective Pierce testified that he interviewed Gibson several days after the homicide. During that interview, Gibson told him she had heard sounds of a struggle and of a woman arguing with appellant. She expressed her belief that appellant's girlfriend had killed him.

3. *Appellant's Conduct After Denton's Death*

Angel Dorsey, appellant's ex-girlfriend, lived a short walking distance from his residence. Dorsey testified that the morning of January 1, 2016, appellant came to her apartment and told her Denton had died in his room after a fight. She saw an injury on appellant's forehead, but he identified no injuries and complained of no pain except a headache. They did not discuss calling the police. Appellant soon left Dorsey's apartment.

Five days later, LAPD officer Jessica Azizi and her partner responded to a report of a trespass at Dorsey's address and arrested appellant there. Officer Azizi testified appellant had bags and a backpack with him.

Detective Pierce testified that he conducted an audio- and video-recorded interview of appellant on the night of his arrest. The recording was played for the jury. After waiving his *Miranda* rights, appellant initially claimed he had been

living on the street for about a month. He later acknowledged living at the Florence Hotel but claimed to reside in a room other than the one where Denton's body was found. Appellant admitted that Denton died after they fought, describing their altercation as "detailed" but declining to discuss any details.

B. *The Defense Case*

Apart from the stipulated testimony of a medical doctor, which was read into the record, appellant was the sole defense witness.[1] He testified that he unexpectedly encountered Denton, a friend whom he had not seen in about a year, while visiting a nearby liquor store on the evening of December 31, 2015. Inviting Denton to join him in visiting some nearby bars, appellant brought him back to his room to lend him more suitable clothing. After Denton left the room temporarily and appellant discovered his two cell phones

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[1] Emergency room physician Ryan O'Connor testified by stipulation that in reviewing photographs of appellant and other documents, he identified several abrasions or lacerations on appellant's left forearm of an age consistent with being sustained on the night of Denton's death. He also identified the following: (1) a linear mark on appellant's forehead that appeared to be an old scar; (2) markings on his left flank that could have been healing abrasions or lacerations or, instead, scratch marks; (3) a healing abrasion or other type of wound on his right kneecap; and (4) skin darkening on his knuckles that could have been bruising or merely a pigment condition.

were missing, appellant called Denton back to the room, accused him of stealing the cell phones, and attempted to retrieve the phone that Denton pulled from his pocket.

Denton punched appellant. Appellant told Denton he was going to call the police and again tried to take the phone. Denton charged at appellant, slammed him to the floor, and repeatedly struck him. After sliding out of Denton's grip and again telling Denton he was going to call the police, appellant tried to leave the room.

Denton blocked the door and again charged at appellant. Appellant responded by throwing canned goods and other objects and by grabbing a stapler to use as a weapon. When the closed stapler proved an ineffective weapon, appellant used the open stapler to embed at least one staple in Denton's body.

Denton removed a staple from his body while blocking the door, smearing blood on it from the tank top he was wearing. Grabbing Denton by the tank top and by the back of his pants, appellant attempted to open the door to throw Denton out. In the process, he ripped the tank top off of Denton. Dropping the tank top by his sink, appellant knocked on the wall he shared with Rose Gibson and screamed for her to call the police.

Denton rushed at appellant again. Denton wrapped his arm around appellant's neck, choking him, "numerous" times. Realizing Denton would release his chokeholds when bitten, appellant repeatedly bit him. Rather than bite

Denton only on the arm wrapped around his neck, appellant tried to slide down to bite other areas too.

After grabbing a clothing iron, Denton rushed at appellant a final time, wrapping the iron's cord around his neck from behind. Appellant tried to get his fingers between the cord and his neck to ease the tension on the cord. From the corner of his eye, appellant saw the iron swinging by his side. Fearing Denton would kill him, he grabbed the iron and struck Denton's head with it until he felt the tension on the cord ease.

Appellant immediately crawled to his bed and passed out until around 8:00 the next morning. Upon realizing Denton was dead, appellant "panicked" and left the building. He did not call the police because he did not know how to explain what had happened. He briefly visited Dorsey and told her he and Denton had fought. After leaving Dorsey's apartment, he drank alcohol and used drugs for the next five days until his arrest.

C. *The Prosecution's Rebuttal Witnesses*

Recalled on rebuttal, Detective Sharman testified that the tank top found in appellant's room was not torn. He further testified that no cell phones were found in appellant's room or booked with the property appellant was carrying when arrested.

Denton's grandmother, Donna Villeda, testified that Denton received a cell phone as a Christmas gift shortly before his death on New Year's Eve.

D. *Closing Arguments*

The prosecutor reviewed the surveillance video from the night of the homicide, noting when Denton re-entered the room for the final time and the long-sleeved clothing he was wearing. She summarized Blassingame's and Gibson's testimony about hearing a struggle and calls for help. She argued that appellant had fled, summarizing Dorsey's testimony about his visit and Officer Azizi's account of his arrest. She summarized appellant's post-arrest interview, noting that he had falsely described his residence and arguing that he had said nothing about self-defense. She recounted the evidence from Denton's autopsy, including the number of potentially fatal blows to Denton's head and the location of the resulting injuries. She argued appellant's testimony made no sense with respect to how Denton ended up shirtless, with staples in his chest.

Defense counsel recounted, in detail, appellant's testimony about the fight and what preceded it. He argued the testimony was consistent with Denton's injuries, appellant's own injuries, and the blood in the room. He emphasized Gibson's testimony that she had heard appellant ask her to call the police. In short, he argued self-defense extensively, summarizing as follows: "This case, I have said it over and over again, but it's about self-defense. That's the only thing the evidence supports." He also argued appellant had not tried to hide any evidence.

In rebuttal, the prosecutor argued the physical evidence discredited appellant's self-defense theory. She

urged the jury to reject appellant's claim that Denton initiated the fight immediately after taking appellant's cell phones and re-entering the room, referencing: (1) the hour that passed between Denton's re-entering the room and Blassingame's waking to sounds of a struggle; (2) Villeda's testimony that Denton had recently received a cell phone; (3) Detective Sharman's testimony that the LAPD found no cell phones on appellant or in his room; and (4) appellant's own testimony that the lights were out, even though he was purportedly searching for clothing when Denton took the phones. Similarly, she urged the jury to reject appellant's account of the fight itself, referencing: (1) autopsy evidence of injuries on both sides of Denton's head and a bite mark on Denton's hand; (2) the photograph showing no tears in the tank top despite appellant's claim he ripped it off of Denton, who in any event was shown on video re-entering the room in long-sleeved clothing, not just a tank top; and (3) photographic evidence of the blood in the room, which suggested it was not smeared in the manner appellant claimed and further suggested it was Denton, not appellant, who was trying to escape. The prosecutor also argued appellant had hidden evidence and lied about the homicide.

E. *Jury Instructions and Verdict*

Before closing arguments, the trial court memorialized an off-the-record discussion of jury instructions. The court noted there had been no objection to instructing the jury on

reducing murder to voluntary manslaughter due to heat of passion (CALCRIM No. 570).

After closing arguments, the court instructed the jury. It instructed the jury on lawful self-defense (CALCRIM No. 505) and on "imperfect" self-defense reducing murder to voluntary manslaughter (CALCRIM No. 571). The court did not instruct the jury on heat of passion.

The court delivered several instructions on consciousness of guilt, instructing the jury that it could infer appellant's awareness of his guilt if it found he had made a false or misleading statement before trial related to the charged crime (CALCRIM No. 362); if it found he had tried to hide evidence (CALCRIM No. 371); or if it found he had fled immediately after the crime (CALCRIM No. 372). The court instructed the jury that none of these findings would be sufficient to prove guilt.

Per CALCRIM No. 226, the court instructed the jury that a factor to consider when evaluating a witness's testimony is how well the witness could hear the things about which the witness testified. Continuing, the court instructed the jury not to "automatically reject testimony just because of inconsistencies or conflicts," explaining that "[p]eople sometimes honestly . . . make mistakes about what they remember," and that "two people may witness the same event[] yet . . . hear it differently."

Almost immediately after the jury began its deliberations, appellant's trial counsel informed the court appellant was concerned the court had not read the heat of

passion instruction. The court responded it believed the court and the parties had taken that instruction out.

The jury convicted appellant of second degree murder and found true the allegation that he used a clothing iron as a deadly weapon.

DISCUSSION

Appellant identifies four grounds for reversal of his conviction, including two instructional errors by the trial court and two omissions by his trial counsel. He alleges the trial court erred in (1) failing to instruct the jury on the heat of passion theory of voluntary manslaughter, and (2) giving the standard flight instruction. He alleges his trial counsel was ineffective for (1) failing to request a jury instruction on the factors affecting "earwitness" identification, and (2) failing to challenge the prosecutor's conduct in reserving the primary substance of her closing argument for rebuttal. We discern no error.

A. *Instructional Error*

1. *Standard of Review*

We review de novo appellant's claims of instructional error. (See *People v. Nelson* (2016) 1 Cal.5th 513, 538; *People v. Posey* (2004) 32 Cal.4th 193, 218.)

2. *Omission of Heat of Passion Instruction*

a. *Governing Principles*

"In a murder case, trial courts are obligated to instruct the jury on defenses supported by substantial evidence that could lead to conviction of the lesser included offense of voluntary manslaughter, even where the defendant objects, or is not, as a matter of trial strategy, relying on such a defense." (*People v. Moye* (2009) 47 Cal.4th 537, 541 (*Moye*).) Evidence is substantial if strong enough to persuade a reasonable jury. (See *id.* at pp. 662-663.)

"Heat of passion is one of the mental states that precludes the formation of malice and reduces an unlawful killing from murder to manslaughter." (*People v. Nelson*, *supra*, 1 Cal.5th at p. 538.) "A heat of passion theory of manslaughter has both an objective and a subjective component." (*Moye*, *supra*, 47 Cal.4th at p. 549.) To satisfy the objective component, the defendant must have reacted to provocation "'that would cause an emotion so intense that an ordinary person would simply *react*, without reflection.'" (*People v. Rangel* (2016) 62 Cal.4th 1192, 1225, quoting *People v. Beltran* (2013) 56 Cal.4th 935, 949.) To satisfy the subjective component, the defendant must have experienced emotion "'so strong that the defendant's reaction bypassed his or her thought process to such an extent that judgment could not and did not intervene.'" (*People v. Rangel, supra,* at p. 1225, quoting *People v. Beltran*, *supra*, at p. 949.)

"In a noncapital case, the trial court's failure to instruct on necessarily included offenses is reviewed for

prejudice under the *Watson* standard." (*People v. Hicks* (2017) 4 Cal.5th 203, 215, italics omitted, citing *People v. Breverman* (1998) 19 Cal.4th 142, 164-178 (*Breverman*).)[2] Courts applying the *Watson* standard focus on what a reasonable jury "is *likely* to have done in the absence of the error under consideration," finding prejudice if "it appears 'reasonably probable' the defendant would have obtained a more favorable outcome . . . ." (*Breverman*, *supra*, at pp. 177-178, quoting *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).)

b. *Analysis*

The trial court did not err by omitting an instruction on the heat of passion theory of voluntary manslaughter because no substantial evidence supported that theory. Appellant's testimony -- the only evidence on which he relies to support the subjective element of a heat of passion theory -- did not support a reasonable inference that appellant's reactions "'bypassed his thought process to such an extent that judgment could not and did not intervene.'" (*People v. Rangel*, *supra*, 62 Cal.4th at p. 1225.) To the contrary,

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[2] Appellant acknowledges that we are bound by our Supreme Court's decision in *Breverman*, *supra*, 19 Cal.4th 142, to apply the *Watson* prejudice standard. (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455.) Appellant argues a different prejudice standard should apply, but notes he raises the issue only to preserve it for federal review.

appellant testified that he reacted to successive advances by Denton in a manner reflecting judgment. In response to Denton's first "charge," appellant wrested himself from Denton's grip, informed Denton he would call the police, and tried to leave the room. In an effort to halt Denton's second "charge," appellant first threw canned goods and other objects at him, then struck Denton with a closed stapler, and later used the open stapler to embed staples in Denton's flesh. In response to Denton's repeatedly putting him in chokeholds, appellant bit Denton -- deliberately reaching for different areas of his body -- to cause Denton to release him. Finally, in response to Denton's strangling him with the clothing iron's cord, appellant struck Denton with the clothing iron, but only until the tension from the cord eased.

Appellant's testimony suggested that these reactions conformed to his thought processes, rather than bypassed them. He decided to open the stapler and to staple Denton's flesh because he realized that merely hitting him with the closed stapler was ineffective. Similarly, because he realized Denton would release him from a chokehold when bitten, he repeatedly bit Denton and made a conscious effort to bite different areas of Denton's body. Even when Denton was strangling him with the iron's cord, appellant demonstrated the presence of mind to focus on relieving the cord's tension, first by trying to work his fingers under the cord and then by swinging with the iron only until the tension eased. Despite testifying repeatedly that he panicked upon realizing Denton

was dead the next morning, appellant never testified he panicked during the fight.

The facts here are similar to those in *Moye*, *supra*, 47 Cal.4th 537. There, our Supreme Court held the omission of a heat of passion instruction was neither erroneous nor prejudicial in the prosecution of a defendant convicted of second degree murder for admittedly killing a man with a baseball bat. (*Id.* at pp. 540-541.) The defendant introduced no evidence on the heat of passion theory's subjective element other than his own testimony, which "provided a blow-by-blow recounting of events in which he characterized every swing he took with the bat as a defensive response to each of [the victim's] successive advances." (*Id.* at p. 554.) The defendant testified he had not been in a "'right state of mind,'" but explained that he was referring to his fear of being beaten or killed, which had entangled his thought processes in his effort to defend himself. (*Id.* at pp. 552, 554.) Thus, the "thrust" of the defendant's testimony was self-defense. (*Id.* at p. 554.) The court concluded there was only insubstantial evidence to support the subjective element, rendering the omission of the heat of passion instruction proper. (*Ibid.*)

Like the defendant in *Moye*, appellant identifies no evidence to support the subjective element other than his own testimony. That testimony, however, like the defendant's testimony in *Moye*, provided a blow-by-blow justification of his actions as responses to successive advances by his victim. Describing self-defense as the

"thrust" of appellant's testimony would be an understatement. Indeed, defense counsel's closing argument emphasized "over and over again" that the case was about self-defense and described self-defense as "the only thing the evidence support[ed]."

These facts distinguish this case from those on which appellant relies. In *Breverman*, the court relied on affirmative evidence that the defendant panicked, including the defendant's suggestion in a police statement that he "acted in one continuous, chaotic response . . . ." (*Breverman, supra*, 19 Cal.4th at p. 164; see also *Moye*, *supra*, 47 Cal.4th at p. 555 [distinguishing *Breverman* on this ground].) Similarly, the defendant in *People v. Thomas* testified that he fired at his victim "because he was afraid, nervous and not thinking clearly." (*People v. Thomas* (2013) 218 Cal.App.4th 630, 645.) Moreover, in both *Thomas* and *Breverman* the courts acknowledged evidence in support of the heat of passion theory beyond the defendant's testimony. (See *id.* at p. 645 [describing testimony from multiple witnesses, including that defendant engaged in a "'pretty heated'" argument, cried, called out for his father, paced, and seemed angry]; *Breverman, supra*, at p. 163 ["Defendant and the other persons in the house all indicated that the number and behavior of the intruders . . . caused immediate fear and panic"].) Finally, although the court in *People v. Anderson* found support for a heat of passion instruction in the defendant's evidence that her codefendant was motivated by rage, the court gave no indication that the codefendant

himself testified about his actions or state of mind. (*People v. Anderson* (2006) 141 Cal.App.4th 430, 435-438, 447.) Thus, *Anderson* is not instructive on the need for a heat of passion instruction where, as here and in *Moye* (decided after *Anderson*), the defendant's own testimony described each of his reactions to the alleged provocation as deliberate acts of self-defense.

Appellant argues the trial court presumptively found substantial evidence to support a heat of passion instruction, and that by failing to object to that presumed finding, the prosecutor forfeited the substantial evidence issue on appeal. We will not presume that the trial court made a finding inconsistent with its actions. The court made no finding of substantial evidence, and there was none. The court did not err by omitting an instruction on heat of passion.

Even had we found error in the trial court's omission of the heat of passion instruction, we would find no prejudice. *Moye* is instructive on this issue too. There, our Supreme Court found it improbable that the jury, having rejected the factual basis for the defendant's self-defense theories, would have found the victim provoked the defendant in a manner satisfying the objective element of the heat of passion theory even if instructed on it. (*Moye*, *supra*, 47 Cal.4th at pp. 556-557.) Moreover, because the defendant had offered no testimony on the subjective element "unrelated to his perceived need for self-defense," the court concluded the jury's rejection of the self-defense theories left "little if any independent evidence" to support the subjective element.

(*Id.* at p. 557.) Here, like the defendant in *Moye*, appellant argues the same evidence underlying his self-defense theories might have convinced the jury to accept his heat of passion theory. Appellant concedes, however, that the jury's rejection of his self-defense theories reflected its conclusion that he "did not have an actual fear that he was in imminent danger of death or great bodily injury." Accordingly, had we found error, we nevertheless would have found no reasonable probability that the instruction would have led the jury to find either that appellant acted out of fear precluding his judgment (satisfying the subjective element) or that Denton provoked him in a manner sufficient to cause such emotion in an ordinary person (satisfying the objective element). (See *id.* at pp. 550, 556-557.)

3. *Flight Instruction*

Appellant argues the trial court erred by instructing the jury with CALCRIM No. 372, the standard flight instruction.

a. *Governing Principles*

Where the prosecution relies on evidence from which a reasonable jury could find flight reflecting consciousness of guilt, the trial court is statutorily required to give a standard flight instruction. (See *People v. Howard* (2008) 42 Cal.4th 1000, 1020; *People v. Price* (2017) 8 Cal.App.5th 409, 454-455 (*Price*) [CALCRIM No. 372 is consistent with the statutory

requirement].)[3] The prosecution must rely on evidence that the defendant left the crime scene in circumstances suggesting "'a purpose to avoid being observed or arrested.'" (*People v. Bonilla* (2007) 41 Cal.4th 313, 328, quoting *People v. Crandell* (1988) 46 Cal.3d 833, 869 (*Crandell*).) "To obtain the instruction, the prosecution need not prove the defendant in fact fled, i.e., departed the scene to avoid arrest, only that a jury *could* find the defendant fled and permissibly infer a consciousness of guilt from the evidence." (*People v. Bonilla, supra,* at p. 328.)

Respondent argues appellant forfeited his contention of error regarding the flight instruction because his trial counsel did not object to it. Where an instructional error affects the defendant's substantial rights, trial counsel's failure to object does not forfeit the contention of error on

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[3] Conceding that he seeks only to preserve them for federal review, appellant raises several challenges to the standard flight instruction that have been rejected in numerous cases. (See *Price*, *supra*, 8 Cal.App.5th at pp. 454, 456 [CALCRIM No. 372]; *People v. Streeter* (2012) 54 Cal.4th 205, 253-254 (*Streeter*) [CALJIC No. 2.52].) As courts have explained, the standard flight instruction "does not lighten the prosecution's burden of proof to show guilt beyond a reasonable doubt." (*Price*, *supra*, at p. 456.) It does not create an unconstitutional permissive inference of guilt. (See *id.* at pp. 455-456.) This is true even where "the principal disputed issue is the defendant's mental state at the time of the crime," rather than whether the defendant committed the alleged acts. (*People v. Smithey* (1999) 20 Cal.4th 936, 983.)

appeal. (*People v. Felix* (2008) 160 Cal.App.4th 849, 857, citing Pen. Code, § 1259.) We apply the *Watson* test for prejudicial error to determine if an instructional error affected the defendant's substantial rights. (*People v. Felix, supra,* at p. 857.)

b. *Analysis*

The trial court properly gave the standard flight instruction because the prosecution relied on sufficient evidence of flight to require it. Appellant concedes his "statements indicate he *was* afraid of being apprehended as a guilty party," or in other words, afraid of arrest. There was evidence that this fear motivated his departure from the crime scene, viz., his residence. Appellant failed to return to his residence even once in the more than five days between the homicide and his arrest. (See *Howard*, *supra*, 42 Cal.4th at p. 1020 [flight finding permissible where defendant failed to return home for two nights after victim's body was discovered in garage across from defendant's room].) Indeed, appellant was arrested with bags and a backpack, suggesting an intent to remain away from his residence and perhaps to move farther away. (See *People v. Bradford* (1997) 14 Cal.4th 1005, 1055 [flight instruction warranted, despite defendant's failure to leave building where he killed victim, in part because defendant packed belongings].) Moreover, appellant never reported Denton's death to the police or otherwise encouraged prompt investigation of the dead body in his room. (See *People v. Smithey*, *supra*, 20

Cal.4th at pp. 982-983 [flight instruction warranted in part because defendant failed to summon help after admittedly killing victim at her home].) The jury reasonably could have inferred from this evidence that appellant left his home in order to avoid arrest.

Contrary to appellant's contentions, this reasonable inference is not negated by appellant's failure to hide his connection to Denton's body or to flee to a more remote location. The jury could have found flight despite appellant's expectation that suspicion would focus on him upon the discovery of Denton's body in his room. (See *Howard*, *supra*, 42 Cal.4th at p. 1021 [where defendant hid victim's body near his room and remained home until its discovery, jury could find defendant fled after he "concluded that suspicion had focused on him"].) Similarly, the jury could have found flight despite the fact that Officer Azizi found him near his residence, at his ex-girlfriend's apartment. (See *ibid.* [flight finding reasonable where defendant was arrested at his aunt's house].)

The flight instruction cases on which appellant relies are distinguishable. In *People v. Green*, the crime scene was in a "remote area," prompting the court to note that "it can hardly be expected that defendant would wait in that location . . . ." (*People v. Green* (1980) 27 Cal.3d 1, 36.) Here, in contrast, one could reasonably expect appellant to return to the crime scene because it was his home. (Cf. *id.* at p. 37 [defendant returning home from crime scene did not suggest consciousness of guilt].) This fact also distinguishes *People*

v. Watson, in which the crime scene was not the defendant's home, but instead "a railroad siding in an industrial area . . . ." (*People v. Watson* (1977) 75 Cal.App.3d 384, 390.) The *Watson* court held only that the "mere" fact of the defendant's arrest miles away from the scene, "standing alone," was not evidence of flight. (*Id.* at p. 403.) Finally, in *Crandell*, the court found the defendant's departure from the crime scene did not show flight, where other evidence established the defendant intended to return to the crime scene to dispose of the victims' bodies. (*Crandell*, *supra*, 46 Cal.3d at pp. 869-870.) Here, appellant claimed neither that he intended to return to his residence nor that he expected Denton's body to escape detection.[4]

Even had we found error in giving the flight instruction, we would find no prejudice. The instruction did not require the jury to infer consciousness of guilt from flight, or

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[4] Finding no error, we necessarily find no error substantially affecting appellant's rights. We therefore conclude appellant forfeited his contention of error on appeal by failing to object to the flight instruction in the trial court. (*People v. Felix*, *supra*, 160 Cal.App.4th at p. 857.) Moreover, we reject appellant's contention that his trial counsel was constitutionally ineffective for forfeiting the issue. Counsel need not object to an unobjectionable instruction. (*People v. Gray* (2005) 37 Cal.4th 168, 201.)

even to find flight in the first instance.[5] (See *Crandell*, *supra*, 46 Cal.3d at p. 870 [erroneous flight instruction not prejudicial in part because it left determination of "both the existence and significance of flight" to the jury].) Moreover, in addition to the flight instruction, the court gave instructions allowing the jury to infer consciousness of guilt if it found appellant had made false statements related to the charge (CALCRIM No. 362) or had tried to hide evidence (CALCRIM No. 371). The prosecutor argued the evidence supported both of these findings. Appellant himself, despite arguing his conduct was not flight, concedes that his conduct "might be seen as manifesting consciousness of guilt." (See *Crandell*, *supra*, at p. 870 [erroneous flight instruction not prejudicial in part because defendant manifested consciousness of guilt through conduct other than flight].) In short, we find no reasonable probability that absent the flight instruction, appellant would have obtained a more favorable result. (See *ibid.*)

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[5] Indeed, the instruction cautioned the jury that even if it found flight, it could not infer guilt from flight alone. Our Supreme Court has recognized that the cautionary aspect of the standard flight instruction may benefit the defense. (*Streeter*, *supra*, 54 Cal.4th at p. 254 ["CALJIC No. 2.52 was a cautionary instruction that benefitted the defense by 'admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory'"], quoting *People v. Jackson* (1996) 13 Cal.4th 1164, 1224.)

B. *Ineffective Assistance of Counsel*

Appellant argues his trial counsel was ineffective for failing to request a jury instruction on the factors affecting "earwitness" identification, and for failing to challenge the prosecutor's conduct in reserving the primary substance of her closing argument for rebuttal.[6]

1. *Governing Principles*

To establish ineffective assistance of counsel, appellant "bears the burden of showing by a preponderance of the evidence that (1) counsel's performance was deficient because it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficiencies resulted in prejudice." (*People v. Centeno* (2014) 60 Cal.4th 659, 674.) To show deficient performance where the record does not explain why counsel acted or failed to act in the allegedly deficient manner, appellant must show there was "'"'no conceivable tactical purpose'"'" for counsel's act or

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[6] Appellant concedes his counsel's failure to object to the prosecutor's conduct in the trial court forfeited his contention of misconduct on appeal. (*People v. Potts* (2019) 6 Cal.5th 1012, 1020 [to preserve misconduct claim for appeal, defendant must timely object and ask trial court to admonish jury].) We note the term "misconduct" is a misnomer to the extent it erroneously implies a requirement to prove the prosecutor erred with a culpable state of mind. (*Ibid.*) We nevertheless use the term because our Supreme Court frequently uses it when analyzing claims of prosecutorial error. (See e.g., *id.* at pp. 1034-1037.)

omission. (*Id.* at p. 675.) To show prejudice, appellant must show a reasonable probability of a more favorable result but for the act or omission. (*Id.* at p. 676.)

2. *Failure to Request Instruction on "Earwitness" Identification*

Appellant argues his trial counsel was constitutionally ineffective for failing to request a jury instruction listing factors affecting the reliability of "earwitness" identification testimony, in the same manner that CALCRIM No. 315 lists factors relevant to eyewitness testimony. Appellant suggests the proposed instruction would have helped the jury understand that Gibson's mistaken identification of a woman speaking during the fight between appellant and Denton resulted from "speaker distortions from stress and anxiety."

An instruction highlighting the potential unreliability of voice identifications would have been more likely to hurt the defense than to help it. Gibson identified appellant, by voice, as the person she heard calling for help. Defense counsel relied on this voice identification to support appellant's self-defense theories. The risk of encouraging the jury to reject this helpful identification provided a tactical reason not to emphasize the unreliability of voice identifications.

Moreover, even without requesting an "earwitness" instruction, defense counsel knew the jury would receive a cautionary instruction relevant to Gibson's mistaken

identification. The court instructed the jury (per CALCRIM No. 226) that a witness's ability to hear the things about which she testified is a factor to consider when evaluating her testimony. The court also cautioned the jury not to "automatically reject testimony just because of inconsistencies or conflicts," explaining that "people sometimes honestly . . . make mistakes about what they remember," and that "two people may witness the same event yet . . . hear it differently." Defense counsel did not render deficient performance by failing to seek additional, potentially harmful emphasis on the unreliability of voice identifications.

Even had we found deficient performance, we would find no prejudice. As noted, an "earwitness" instruction may have encouraged a result *less* favorable to appellant by undermining the jury's confidence in Gibson's identification of appellant as the person calling for help. Even if the instruction's potential effect were somehow limited to Gibson's mistaken identification of a woman, appellant has provided no evidence that the instruction would have had any effect. (See Laub et al., *Can the Courts Tell an Ear from an Eye? Legal Approaches to Voice Identification Evidence* (2013) 37 Law & Psychol. Rev. 119, 152 [reporting absence of research to support conclusion that voice identification instructions would help jurors evaluate testimony

properly].)[7] The eyewitness instruction cases on which appellant relies are distinguishable, inter alia, because they concern instruction on a different type of testimony.[8] In sum, appellant has failed to show prejudice.

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[7] This law review article demonstrates familiarity with voice identification research by professors A. Daniel Yarmey and Harry Hollien, on which appellant relies. (See Laub et al., *supra*, at pp. 120 fn. 5, 125 fns. 41 & 44, 141, 146 fn. 213, 153.) We cite the article only to emphasize appellant's failure to produce evidence that an "earwitness" instruction would have helped the jury.

[8] Appellant derives no support from *People v. Palmer*, in which eyewitness identification testimony was the only evidence against the defendant, who disputed only his identity as the robber. (*People v. Palmer* (1984) 154 Cal.App.3d 79, 83, 89.) Here, appellant conceded his identity as Denton's killer, and the prosecution relied on abundant evidence other than the "earwitness" testimony. As noted, that testimony was helpful to the defense with respect to Gibson's identification of appellant. Moreover, in other eyewitness instruction cases on which appellant relies, our Supreme Court found no prejudice in omitting such an instruction despite the key role of eyewitness identification at trial. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1101, 1110-1112 [eyewitness identification was one of two major types of evidence against defendant]; *People v. Wright* (1988) 45 Cal.3d 1126, 1131-1132 [eyewitness identification was "sole" evidence against defendant].)

3. *Failure to Object to Prosecutor's Rebuttal Argument*

Appellant argues his trial counsel was constitutionally ineffective for failing to challenge alleged prosecutorial misconduct during rebuttal argument in any of three ways: objecting, requesting sur-rebuttal, or moving for a mistrial. Conceding that he alleges no cumulative misconduct, appellant faults the prosecutor only for allegedly reserving the primary substance of her closing argument for rebuttal, purportedly denying him a fair chance to respond.

We find no misconduct. A finding of prosecutorial misconduct "cannot be based on a prosecutor's remarks responsive to defense counsel's argument, as long as those remarks do not go beyond the record." (*People v. Reyes* (2016) 246 Cal.App.4th 62, 74 (*Reyes*), citing *People v. Hill* (1967) 66 Cal.2d 536, 562.) As illustrated by our summary of the closing arguments, the prosecutor presented a substantive initial argument, then focused on rebutting defense counsel's self-defense theory. The prosecutor did not deprive defense counsel of a fair chance to respond merely because she did not, in anticipation of defense counsel's argument, address the evidence discrediting it in the same level of detail in her initial argument as in her rebuttal. (See *Reyes, supra,* at pp. 73-74 [prosecutor did not "blindside" defense counsel, despite referencing victim's sexual orientation for first time on rebuttal, where reference was fair response to defense theory that victim consented to sex acts]; *People v. Fernandez* (2013) 216 Cal.App.4th 540,

560, 563, 564 (*Fernandez*) [defense not "sandbagged" by rebuttal argument on witness credibility where "vast majority" of rebuttal was fair response to defense theory that victims alleged sexual abuse to seek attention].)

Appellant principally relies on *People v. Robinson* (1995) 31 Cal.App.4th 494 (*Robinson*), decided on starkly different facts. There, the Court of Appeal found misconduct during closing arguments because the prosecutor gave a "perfunctory" initial argument (spanning only three-and-a-half reporter transcript pages), followed by a rebuttal argument that was ten times longer (35 pages). (*Id.* at p. 505.) The court reversed an arson conviction not only because the prosecutor used this inappropriate rebuttal tactic, but also because the trial court erroneously excluded defense evidence, the prosecutor withheld evidence, and the prosecutor committed misconduct during cross-examination of a witness. (*Id.* at pp. 504-505.)

Here, in contrast, the prosecutor presented an initial argument that was far from perfunctory, followed by a shorter rebuttal argument responsive to the defense. (See *Reyes*, *supra*, 246 Cal.App.4th at p. 74 [distinguishing *Robinson* on similar grounds]; *Fernandez*, *supra*, 216 Cal.App.4th at pp. 563-564 [same].) Moreover, appellant concedes he has alleged no cumulative misconduct like that on which the *Robinson* court relied. (See *Reyes*, *supra*, at pp. 74-75 [further distinguishing *Robinson* due to absence of cumulative misconduct].) In sum, defense counsel had a

tactical reason not to object to misconduct because there was none. (See *Fernandez*, *supra*, at p. 565.)

Even had we found counsel's performance deficient, we would find no prejudice. If defense counsel had convinced the trial court that the prosecutor had deprived him of a fair chance to respond, the likely and proper remedy would have been an opportunity for additional response. Yet appellant fails to identify any additional argument his counsel would, should, or could have made, or to explain how additional argument might have affected the outcome in his favor. These failures are fatal to a showing of prejudice.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, P. J.

We concur:

WILLHITE, J.

COLLINS, J.